IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

COMPANY PETITION No. 191 of 2006
In
COMPANY APPLICATION No. 531 of 2006
With
COMPANY PETITION No. 192 of 2006
In
COMPANY APPLICATION No. 532 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE M.R. SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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MOZZATERRA TILES PVT. LTD. - Petitioner(s)
Versus
. - Respondent(s)

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Appearance :
MRS SANGEETA N PAHWA for Petitioner(s) : 1,
MR PURVISH J MALKAN for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE M.R. SHAH

Date : 08/01/2007

ORAL JUDGMENT

Both these company petitions are filed for sanctioning the scheme of amalgamation of MOZZATERRA

TILES PVT. LTD. with VYARA TILES PVT. LTD. MOZZATERRA TILES PVT. LTD. (transferor company) is the petitioner of Company Petition No.191 of 2006 and VYARA TILES PVT. LTD (transferee company) is the petitioner of Company Petition No.192 of 2006.

2. It is submitted on behalf of the respective petitioners that the Board of Directors of both the companies i.e. transferee and transferor companies have considered the amalgamation of transferor company into transferee company for better utilization of the resources, the assets and the properties of the companies resulting into higher returns of the capital. It is further submitted that the Board of Directors of both the companies have resolved to prepare and to have the scheme of amalgamation between the transferor company and the transferee company subject further to the approval of the shareholders, creditors, sanction of the appropriate Court as may be required under the law and the consent, objection of the Central Government and other appropriate authorities as may be necessary.

3. It is submitted that having procured and produced the written approval of all the equity shareholders,

unsecured creditors as well as secured creditors of the transferor company by order dated 6-10-2006 passed in Company Petition No.531 of 2006, this Court passed an order dispensing with holding of the meeting of the equity shareholders, unsecured creditors as well as secured creditors of the transferor company in relation to the proposed scheme of amalgamation as required under section 391 of the Companies Act, 1956.

4. It is also further submitted that having procured and produced written approval of all the equity shareholders of the transferee company by order dated 6-10-2006 passed in Company Petition No.532 of 2006, the meeting of the equity shareholders of the transferee company in relation to the proposed scheme of amalgamation is required under section 391 of the Act came to be dispensed with.

5. Both these petitions came to be admitted by this Court by order dated 10-10-2006 and it was directed to publish advertisement about admission and date of final hearing on both the company petitions in “Gujarat Mitra” (Gujarati daily) and “Indian Express” (English daily), both Surat editions. It is reported that advertisements

were published in both the local newspapers on 18-10-2006 and 17-10-2006 respectively and an affidavit of publication dated 13-11-2006 is filed. No objections have been received by this Court opposing the present company petitions.

6. Notice of Company Petition No.191 of 2006 was served upon the Official Liquidator and after availing the services of the Chartered Accountant to consider the affairs of the company, the Official Liquidator has submitted report dated 2-12-2006 confirming that the acts and transactions of the company were conducted as per the objects mentioned in the Memorandum of Association of the company and that the affairs have not been conducted in the manner prejudicial to the interest of the members or to public interest. However, on going through the report of the Official Liquidator, while making the above observation, the Official Liquidator has also submitted that the Chartered Accountant in the concluding para of his report has made the following remarks.

A. *Company's book were destroyed by the flood water and hence cannot be produced before us for scrutiny. We have relied upon the Audited Accounts of the Company.*

B. *During the Financial Year 2003-2004, the*

Company has received subsidy of Rs.15,00,000/- from the State Government and has been credited to the Profit and Loss Appropriation Account which is contrary to the Accounting Standard-12 issued by the institute of Chartered Accountants of India. Subsidy is a capital receipt. Thus, the company has artificially reduced his accumulated balance of loss. Moreover, such disclosure was not made in the current year. Profit and Loss Account and the subject matter was discovered from the year Audited Annual Accounts for the year 2004-2005.

We have enquired that if the company considers the subsidy as revenue receipt, then why the same was not added in the Income Tax return filed by the company. No proper explanation was given to us,- the company.

C. *During the year 2005-2006, expenditures relating to Manufacturing (Labour) and Transportation were found exorbitant, it is explained to us that due to increse in the production of Paver (Finished Goods) the said expenditure has been increased. No supporting evidences were produced. On contrary, Tax Audit Report signed by company's Chartered Accountants is silent about the quantity manufactured.*

7. An affidavit is filed on behalf of the petitioner company dealing with the remarks made by the Chartered Accountant. With respect to remarks in para A, it is

submitted that the company has produced panchnama, photographs and news of paper cutting etc. to establish that the books were destroyed in the flood water. It is also further submitted that however, the Audited Accounts of the Company were produced and considering the same, the Chartered Accountant submitted its report. So far as remarks in para 3 is concerned, it is submitted by and on behalf of the company that the subsidy received by the company is not to be treated as income as per the accounting standard and thus, subsidy amount is mentioned in the Profit and Loss Account after the figure of the Profit and Loss of the company for the relevant financial year and as the subsidy is not an income, the same is in fact not shown in the income tax returns filed by the company. With respect to remarks contained in para C, the petitioner company has tried to explain and meet with the said remarks as per their explanation in terms of para 6. After having gone through the report of the Official Liquidator, remarks made by the Chartered Accountant as well as affidavit filed by the petitioner company dated 22-12-2006, it appears to the Court that the remarks made by the Chartered Accountant are clarified and therefore, there is no reason not to sanction the scheme of amalgamation. The petitioner company has been able to

satisfy the Court that the books of the company were destroyed by the flood water. However, the Audited Accounts of the company were produced and on that basis, the affairs of the company have been verified and considered by the Chartered Accountant. Similarly, the company has also clarified that the subsidy amount is not treated as income and even the same is also not shown in the income tax returns. Considering the above, this Court is satisfied that the scheme can be sanctioned.

8. Notice of both company petitions have been served upon the Central Government and the Regional Director and an affidavit is filed by the Asst. Registrar of the company, office of Registrar of Companies along with the communication by the Regional Director, Ministry of Company Affairs, Western Region dated 28-11-2006, wherein it is reported that the office of the Regional Director has examined both the company petitions and the scheme and it was decided not to oppose the petitions, save and except that the transferee company is not having sufficient authorized capital for issuance of shares of Rs.6,25,000/-. It is further submitted that before the issuance of shares, the transferee company is required to increase its authorized share capital and to comply with

the provisions of sections 94 and 97 of the Companies Act, 1956 and file form No.5 with the filing fee as per Schedule X of the Companies Act, 1956. Meeting with the said objections on behalf of the Regional Director, Central Government, Shri Pahwa, learned advocate appearing on behalf of the respective petitioners has made a statement at the bar that the authorized capital will be increased by the transferee company so as to give effect to the scheme of amalgamation. In view of the above statement, the objection raised by the Central Government through its Regional Director meets with the observations made by the Registrar of Companies and the same will not survive. Now so far as other observations made by the Regional Director/Registrar of Companies with regard to payment of registration charges or stamp duty is concerned, in view of the decision of the learned Single Judge of this Court dated 4-7-2005 in Company Petition No.41 of 2005 and other cognate petitions, the said observations would not survive. On going through the scheme of amalgamation, it also appears to the Court that the amalgamation would be in the interest of company and their members and creditors. Accordingly, the prayers in terms of para 15(A) in Company Petition Nos.191 of 2006 and 192 of 2006 are hereby granted, subject to increasing

the authorized share capital as stated hereinabove.

9. Both these company petitions are accordingly disposed of. So far as cost to be paid to the learned Central Government Standing Counsel, the same is quantified at Rs.3500/- per petition and the same is paid to Shri PJ Malkan by the respective petitioners.

(M.R.SHAH,J.)

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